ABU HASSAN HASBULLAH v. ZUKERI IBRAHIM

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
AB KARIM AB JALIL JCA
ASMABI MOHAMAD JCA
[CIVIL APPEAL NO: D-02(NCVC)(W)-349-02-2016]
22 OCTOBER 2017

TORT: *Defamation – Libel – Ingredients – Proof – Impugned emails containing words allegedly defamatory of plaintiff sent to various parties – Whether impugned emails capable of bearing defamatory meaning, referred to plaintiff and published to third person – Whether trial judge had duty to rule on essential ingredients before proceeding to decide on defences – Whether trial judge applied settled principles of law – Whether trial judge failed to judicially appreciate evidence and law – Whether appellate intervention warranted*

TORT: *Defamation – Libel – Qualified privilege – Justification – Impugned emails containing words allegedly defamatory of plaintiff sent to various parties – Whether impugned emails capable of bearing defamatory meaning, referred to plaintiff and published to third person – Whether defendant had duty to send impugned emails to parties concerned – Whether parties who received emails had interest in matters raised – Whether defendant as probationary lecturer adhered to university guidelines in sending impugned emails – Statements in impugned emails not verified to be true – Whether defence of qualified privilege and justification applied*

TORT: *Defamation – Libel – Fair comment – Impugned emails containing words allegedly defamatory of plaintiff sent to various parties – Whether statement of facts could be termed as comments for purpose of defence – Failure to comply with O. 78 of Rules of Court 2012 – Whether defendant had legal duty to send impugned emails – Whether defence of fair comment applied*

TORT: *Damages – Defamation – Libel – Compensatory, aggravated and exemplary damages – Whether award ought to be sufficient to vindicate gravity of allegations against plaintiff*

The appellant ('the plaintiff'), a senior academician/lecturer and political analyst and Dean of the Faculty of Creative Technology and Heritage ('FTKW') at the University of Malaysia Kelantan ('UMK') commenced an action against the respondent ('the defendant'), a lecturer on probation in FTKW, for the tort of defamation. The plaintiff claimed that the defendant had authored two offensive emails ('the impugned emails') and caused the same to be published *via* the defendant's UMK email address to various groups, namely all academic staff and administrators of FTKW. The plaintiff contended that the words in the impugned emails as underlined, in their natural and ordinary meaning, were defamatory of the plaintiff, calculated to disparage the plaintiff and were issued with malicious intent and published

A and circulated to the above-stated groups. Consequently, the plaintiff suffered distress and embarrassment and his personal reputation and that of his office had been adversely affected and had caused him to be despised and injured and brought into public scandal, odium and contempt. The defendant had also sent various text messages from his mobile phone to the plaintiff, *inter*
B *alia*, threatening to have the plaintiff sent to jail and falsely accusing the plaintiff of cheating on his grading. Subsequent to the said impugned emails and text messages, there had been a barrage of articles, news, reports and statements posted almost daily on online news portal Suara TV stating that Suara TV had been informed by an individual who was a lecturer in UMK
C that the plaintiff had committed fraud. The plaintiff demanded the defendant withdraw and/or retract the two impugned emails, render an apology to the plaintiff as well as give an undertaking that he would not repeat similar publication of defamatory statements concerning the plaintiff to the public at large. The plaintiff also demanded that the defendant ceased to cause any further threats and harassments to the plaintiff. The plaintiff then commenced
D this suit seeking for, amongst others, injunctive relief, damages for defamation, interests and costs. In response, the defendant pleaded the defence of justification and claimed that the impugned emails were 'fair comments' on matters of 'public interest' to UMK, FTKW and all its students. The defendant also relied on the defence of 'qualified privilege',
E stating that the impugned emails were a proposal to resolve pending problems and to raise matters concerning the administration and management of FTKW. The case proceeded by way of a full trial and the judge accepted the defendant's defences and dismissed the plaintiff's claim with costs. Aggrieved, the plaintiff appealed against the said decision.

F **Held (allowing appeal)**

Per Asmabi Mohamad JCA delivering the judgment of the court:

(1) Despite the magnitude of the complaints made against the defendant as evidenced in the impugned emails, the trial judge had reduced the
G complaints to only the issues surrounding the plaintiff's reference to materials from a non-existent university known as 'University Manggis' in his thesis and on the non-accredited courses. The trial judge had also made a finding that there was plagiarism in the plaintiff's thesis despite the fact that the impugned emails made no reference to the complaint of plagiarism. There was no mention of the rest of the over 200 defamatory
H statements as underlined in the impugned emails. In arriving at his determination, the trial judge did not address the facts in totality and/or make a finding if those underlined words were defamatory of the plaintiff. The trial judge did not apply settled principles of law and did not address the stages that must be satisfied before resolving whether
I there was defamation and whether the defences applied. (paras 29, 30, 32-34)

(2) In a defamation case, the trial judge has a duty to rule on the three essential ingredients of the tort of defamation before he proceeds to decide on the defences pleaded by the defendant in his defence. The trial judge ought to (i) determine if the impugned emails were capable of bearing the defamatory meaning as ascribed in the statement of claim; (ii) examine if the impugned emails referred to the plaintiff and (iii) resolve if the impugned emails were published to a third person. This task was not undertaken by the trial judge herein. The trial judge was selective and had ruled only on certain issues, one of which was not even the subject matter of the plaintiff's complaint. The trial judge had also failed to address the third ingredient of the tort of defamation. His Lordship ought to have evaluated the evidence before making a finding on each and every ingredient of the tort of defamation before going to the defences. (paras 36-39)

(3) The trial judge was not satisfied that the plaintiff had proven the first ingredient of the tort of defamation but had proceeded to make a ruling that the defendant had successfully raised the defences of justification, qualified privilege and fair comment. If the trial judge was of the opinion that the first element of the tort of defamation had not been proven, the trial judge ought to have dismissed the plaintiff's case. The trial judge seemed to be confused on the manner the case before him ought to be resolved. The trial judge did not decide if the underlined words respectively in the impugned emails were defamatory of the plaintiff or whether these words had lowered the plaintiff in the estimation of right thinking members of society generally. The trial judge erred in deciding in the manner he did, as the plaintiff need not prove that the defamatory words were false in order to prove his case as the law presumes that the defamatory words were false. The plaintiff only needed to prove the publication of the impugned emails. (paras 41-43)

(4) The impugned emails were addressed to third parties who did not have an interest or duty to receive the same. The impugned emails were not true nor proven to be true. When the defendant wrote the two impugned emails, he was a probationary lecturer and there was a clear avenue and/or procedure for complaints to be addressed on matters concerning FTKW. The defendant did not have the duty to send the impugned emails. The defendant did not adhere to UMK's own guidelines in sending the said impugned emails to the recipients of the email addresses. The words underlined in the impugned emails were statement of facts that were not true and not verified to be true prior to the defendant having published the same. Further, the trial judge fell into error when he resolved that the defendant had successfully raised the defence of justification when there was no explanation afforded with regards to the bulk of the complaints. The plea of justification must be

A specific as to which parts of the statements were said to be the truth. Herein, the defendant had not identified and/or particularised which part of the impugned emails enjoyed protection of justification. The defence of justification and qualified privilege was thus wrongly accepted by the trial judge. (paras 52, 54 & 56)

B **(5)** As the trial judge did not make a finding if the complaints were defamatory of the plaintiff, the trial judge could not go on to say that the complaints were fair comments. The complaints stated in the impugned emails showed that these complaints were not comments but statement of facts which could not be termed as comment for the purpose of the C defence of fair comment. Therefore, it was not open to the defendant to raise defence of fair comment concerning the public at large. The defendant had not complied with the provision of O. 78 of the Rules of Court 2012. The defendant had failed to give particulars stating which of the words complained of that he alleged were statement of facts and D matters he relied on, in support of the allegation that the words were true. The trial judge erred in law and in fact in his finding that the defence of fair comment was available to the defendant. (paras 63-65)

(6) The impugned emails were sent by a person who did not have the legal duty and interest or a duty, legal or social or moral, to make it and the E recipient of the impugned emails did not have a corresponding interest or duty to receive it. The defendant was only a probationary lecturer. There was already in place a mechanism in UMK for matters such as this to be referred to. Therefore, the defendant did not have the legal duty and interest or a duty, legal or social or moral to send the impugned F emails. (paras 68 & 69)

(7) On the balance of probabilities, the defendant in this action was liable to the plaintiff. The words as underlined in the impugned emails were capable of and were defamatory of the plaintiff. These words in their natural and ordinary meaning, meant or were understood to bear the G meaning as ascribed by the plaintiff in its statement of claim. The words as underlined in the impugned emails which referred to the plaintiff were published to third parties. The defendant had not established on the balance of probabilities any of the defences pleaded in his defence. The trial judge had failed to judicially appreciate the evidence and the law H presented before him so as to render his decision plainly wrong and upon curial scrutiny, merit appellate intervention. (paras 74 & 81)

(8) The allegations against the plaintiff were very serious imputing to him, *inter alia*, criminal act, dishonesty, lack of credibility, greed and cheating. These allegations were highly libellous to the plaintiff. Any I award to be awarded must be sufficient to vindicate the gravity of the allegations against the plaintiff. The plaintiff was a senior lecturer, an

educationist, a member of Majlis Professor Negara, political analyst and the Dean of FKTW of UMK. Hence, the plaintiff deserved an appropriate vindication and ought to be adequately compensated. Further, looking at the behaviour of the defendant, who did not express any regret or remorse on the alleged defamatory published statements, this court awarded compensatory, aggravated and exemplary damages of RM70,000 to the plaintiff, which was adequate to vindicate the plaintiff to the public and console him for the wrong done to him by the defendant. (paras 76-78 & 80).

Bahasa Malaysia *Headnotes*

Perayu ('plaintif') seorang ahli akademik/pensyarah kanan dan penganalisis politik serta Dekan Fakulti Teknologi Kreatif Dan Warisan ('FTKW') di Universiti Malaysia Kelantan ('UMK') memulakan tindakan terhadap responden ('defendan'), seorang pensyarah dalam tempoh percubaan di FTKW, untuk tort fitnah. Plaintif mendakwa defendan telah menulis dua e-mel yang menyakiti ('kedua-dua e-mel') dan menyebabkan ini diterbitkan melalui alamat e-mel UMK defendan kepada beberapa kumpulan, iaitu semua staf akademik dan pentadbir FTKW. Plaintif mendakwa bahawa perkataan-perkataan dalam kedua-dua e-mel seperti yang digariskan, dalam maksud semula jadi dan biasa, memfitnah plaintif, merendah-rendahkan plaintif dan dikeluarkan dengan niat jahat dan diterbit dan diedarkan kepada kumpulan-kumpulan tersebut. Akibatnya, plaintif mengalami penderitaan dan keaiban dan reputasi dirinya serta pejabatnya teruk terjejas dan telah menyebabkan dirinya dipandang rendah dan hingga terbawa menjadi skandal awam, kebencian dan penghinaan. Defendan juga menghantar beberapa pesanan teks dari telefon bimbitnya kepada plaintif, antara lain, mengugut untuk menghantar plaintif ke penjara dan menuduh plaintif menipu dalam penggredannya. Akibat kedua-dua e-mel dan pesanan teks tersebut, terdapat beberapa artikel-artikel, berita, laporan dan kenyataan yang diumumkan hampir setiap hari atas portal berita dalam talian Suara TV menyatakan bahawa Suara TV telah dimaklumkan oleh seorang individu yang merupakan pensyarah di UMK bahawa plaintif telah melakukan penipuan. Plaintif menuntut defendan menarik balik dan/atau menarik semula kedua-dua e-mel, membuat permohonan maaf pada plaintif dan juga berjanji bahawa dia tidak akan mengulangi penerbitan kenyataan fitnah yang sama berhubungan plaintif kepada pihak awam. Plaintif juga menuntut defendan menghentikan apa-apa ugutan dan gangguan kepada plaintif. Plaintif kemudiannya memulakan guaman ini menuntut, antara lain, relif injunksi, ganti rugi fitnah, faedah dan kos-kos. Sebagai balasan, defendan memplidkan pembelaan justifikasi dan mendakwa bahawa kedua-dua e-mel adalah ulasan saksama berkenaan perkara-perkara yang melibatkan 'kepentingan awam' pada UMK, FTKW dan semua pelajar-pelajarnya. Defendan juga bergantung pada pembelaan 'perlindungan bersyarat', dengan menyatakan bahawa kedua-dua

A e-mel adalah cadangan untuk menyelesaikan masalah-masalah yang belum selesai dan membangkitkan perkara-perkara berhubungan pentadbiran dan pengurusan FTKW. Kes diteruskan melalui perbicaraan penuh dan hakim menerima pembelaan defendan dan menolak tuntutan plaintif dengan kos. Terkilan, plaintif merayu terhadap keputusan tersebut.

B **Diputuskan (membenarkan rayuan)**
Oleh Asmabi Mohamad HMR menyampaikan penghakiman mahkamah:

(1) Walaupun aduan yang dibuat agak banyak terhadap defendan seperti yang terbukti dalam kedua-dua e-mel, hakim bicara hanya menumpukan pada beberapa isu sahaja yang mengelilingi rujukan plaintif pada
C material daripada universiti yang tidak wujud dikenali sebagai 'Universiti Manggis' dalam tesisnya dan kursus-kursus yang tidak terakreditasi. Hakim bicara juga membuat dapatan bahawa terdapat plagiarisme dalam tesis plaintif walaupun kedua-dua e-mel tidak membuat rujukan pada aduan plagiarisme. Dua ratus kenyataan fitnah
D yang lain seperti yang digariskan dalam kedua-dua e-mel tidak disentuh. Dalam mencapai keputusan beliau, hakim bicara tidak menangani fakta-fakta secara keseluruhan dan/atau membuat dapatan jika kata-kata yang digariskan memfitnah plaintif. Hakim bicara tidak mengguna pakai prinsip-prinsip matan dan tidak menangani peringkat-peringkat yang
E harus dipenuhi sebelum menghuraikan sama ada terdapat fitnah dan sama ada pembelaan-pembelaan boleh dipakai.

(2) Dalam kes fitnah, hakim bicara mempunyai tanggungjawab memutuskan tiga unsur tort fitnah sebelum meneruskan dengan keputusannya berkenaan pembelaan-pembelaan yang diplidkan oleh defendan dalam
F pembelaannya. Hakim bicara sepatutnya (i) menentukan jika kedua-dua e-me mampu membawa kenyataan fitnah seperti yang dinyatakan dalam pernyataan tuntutan; (ii) memeriksa jika kedua-dua e-mel merujuk pada plaintif dan (iii) menghuraikan sama ada kedua-dua e-mel diterbitkan kepada pihak ketiga. Hakim bicara selektif dan hanya memutuskan
G berkenaan beberapa isu sahaja, dan salah satunya bukan hal perkara aduan plaintif. Hakim bicara juga gagal menangani unsur ketiga tort fitnah. Hakim bicara sepatutnya menilai keterangan sebelum membuat dapatan berkenaan setiap unsur tort fitnah sebelum ke pembelaan-pembelaannya.

H **(3)** Hakim bicara tidak berpuas hati bahawa plaintif telah membuktikan unsur pertama tort fitnah tetapi terus memutuskan defendan berjaya membangkitkan pembelaan-pembelaan justifikasi, perlindungan bersyarat dan ulasan saksama. Jika hakim bicara berpendapat elemen pertama tort fitnah tidak dibuktikan, beliau sepatutnya menolak kes
I plaintif. Hakim bicara dilihat keliru dengan cara menyelesaikan kes di hadapan beliau. Hakim bicara tidak memutuskan jika kenyataan-

kenyataan yang digariskan dalam kedua-dua e-mel adalah memfitnah plaintif atau sama ada kenyataan-kenyataan tersebut telah merendahkan plaintif dalam anggapan individu-individu yang berfikiran waras secara umum. Hakim bicara terkhilaf dalam memutuskan dengan cara sedemikian, kerana plaintif tidak perlu membuktikan kenyataan-kenyataan fitnah adalah palsu untuk membuktikan kesnya kerana undang-undang menganggap kata-kata fitnah adalah dusta. Plaintif hanya perlu membuktikan penerbitan kedua-dua e-mel.

(4) Kedua-dua e-mel dialamatkan kepada pihak ketiga yang tidak mempunyai kepentingan atau tanggungjawab untuk menerimanya. Kedua-dua e-mel tidak benar dan tidak dibuktikan benar. Apabila defendan menulis kedua-dua e-mel, dia seorang pensyarah dalam tempoh percubaan dan terdapat jalan dan/atau prosedur jelas untuk aduan ditangani bagi hal perkara berhubungan FTKW. Defendan tidak mempunyai tanggungjawab menghantar kedua-dua e-mel ini. Defendan tidak mematuhi garis-garis panduan UMK dalam menghantar kedua-dua e-mel ini kepada penerima-penerima alamat kedua-duanya. Kenyataan-kenyataan yang digariskan dalam kedua-dua e-mel adalah kenyataan fakta yang tidak benar dan tidak disahkan betul sebelum defendan menterbitkannya. Selanjutnya, hakim bicara terkhilaf dalam memutuskan defendan berjaya membangkitkan pembelaan justifikasi apabila tiada penjelasan berkenaan aduan-aduan itu. Pli justifikasi harus spesifik berkenaan bahagian-bahagian kenyataan yang dikatakan benar. Di sini, defendan tidak mengenal pasti dan/atau mengkhususkan bahagian mana kedua-dua e-mel boleh memperoleh perlindungan justifikasi. Pembelaan justifikasi dan perlindungan bersyarat dengan itu salah diterima oleh hakim bicara.

(5) Oleh kerana hakim bicara tidak membuat dapatan jika aduan-aduan tersebut memfitnah plaintif, hakim bicara tidak boleh menyatakan aduan-aduan adalah ulasan saksama. Aduan-aduan yang dinyatakan dalam kedua-dua e-mel menunjukkan bahawa aduan-aduan ini bukanlah ulasan tetapi kenyataan fakta yang tidak boleh disebut sebagai ulasan bagi tujuan pembelaan ulasan saksama. Oleh itu, tidak terbuka buat defendan untuk membangkitkan pembelaan ulasan saksama berhubungan pihak awam. Defendan tidak mematuhi peruntukan A. 78 Kaedah-Kaedah Mahkamah 2012. Defendan gagal memberikan butir-butir menyatakan kenyataan mana yang diadu, yang didakwanya adalah kenyataan fakta dan hal perkara yang dirujuknya untuk menyokong dakwaannya, adalah benar. Hakim bicara terkhilaf dari segi undang-undang dan fakta dalam dapatannya bahawa pembelaan ulasan saksama boleh diguna pakai oleh defendan.

(6) Kedua-dua e-mel dihantar oleh seorang yang tidak mempunyai kewajipan atau kepentingan undang-undang atau tanggungjawab, secara undang-undang atau sosial atau moral, untuk melaksanakannya dan penerima kedua-duanya tidak mempunyai kepentingan atau kewajipan yang sepadan untuk menerimanya. Defendan hanyalah pensyarah dalam tempoh percubaan. Sudah terdapat mekanisme di UMK untuk perkara-perkara seperti ini sebagai rujukan. Oleh itu, defendan tidak mempunyai kewajipan dan kepentingan undang-undang atau tanggungjawab, secara undang-undang, sosial atau moral untuk menghantar kedua-dua e-mel tersebut.

(7) Atas imbangan kebarangkalian, defendan dalam tindakan ini bertanggungjawab terhadap plaintif. Perkataan-perkataan yang digariskan dalam kedua-dua e-mel mampu memfitnah plaintif. Perkataan-perkataan ini dalam maksud semula jadi dan biasa, bermaksud atau difahamkan membawa maksud seperti yang dinyatakan plaintif dalam penyataan tuntutan. Perkataan-perkataan yang digariskan dalam kedua-dua e-mel yang merujuk pada plaintif telah diterbitkan pada pihak ketiga. Defendan tidak membuktikan atas imbangan kebarangkalian pembelaan-pembelaan yang diplidkan dalam pembelaannya. Hakim bicara gagal mempertimbangkan secara kehakiman keterangan dan undang-undang yang dibentangkan di hadapannya, menjadikan keputusannya dengan jelas salah dan semasa penelitian curial, mewajarkan campur tangan rayuan.

(8) Dakwaan-dakwaan terhadap plaintif adalah serius yang mengakibatkan plaintif dilihat, antara lain, melakukan tindakan jenayah, tidak amanah, tidak mempunyai kredibiliti, kehalobaan dan menipu. Dakwaan-dakwaan ini amat memfitnah plaintif. Apa-apa award harus memadai untuk menyangkal dakwaan-dakwaan terhadap plaintif. Plaintif adalah seorang pensyarah kanan, seorang ahli pendidikan, ahli Majlis Profesor Negara, penganalisis politik dan Dekan FTKW di UMK. Oleh itu, plaintif berhak mendapatkan penyangkalan sesuai dan harus dibayar pampasan dengan secukupnya. Tambahan lagi, memandangkan tingkah laku defendan, yang tidak menzahirkan sebarang kekesalan atau sesalan berkenaan kenyataan-kenyataan yang didakwa memfitnah, mahkamah ini mengawardkan ganti rugi pampasan, terkilan dan teladan berjumlah RM70,000 kepada plaintif, yang mencukupi untuk menjustifikasikan plaintif kepada pihak awam dan sebagai satu pujukan atas kesalahan yang dibuat oleh defendan terhadapnya.

Case(s) referred to:
Abdul Rahman Talib v. Seenivasagam & Anor [1964] 1 LNS 2 HC ***(refd)***
Adam v. Ward [1917] AC 309 ***(refd)***
AJA Peter v. OG Nio & Ors [1979] 1 LNS 1 HC ***(refd)***
Ayob Saud v. TS Sambanthamurthi [1989] 1 CLJ 152; [1989]1 CLJ (Rep) 321 HC ***(refd)***
Chin Choon v. Chua Jui Meng [2005] 2 CLJ 569 CA ***(refd)***
Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA ***(refd)***
Datuk Seri Anwar Ibrahim v. Utusan Melayu (M) Bhd & Anor [2013] 3 MLJ 534 ***(refd)***
English v. Emery Reimbold & Strick Ltd [2002] EWCA Civ 605 ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Hamit Matusin & Ors v. Penguasa Tanah dan Survei & Anor And Another Appeal [2006] 2 CLJ 251 CA ***(refd)***
Irene Fernandez v. Utusan Melayu (M) Sdn Bhd & Anor [2008] 2 CLJ 814 HC ***(refd)***
John Lee & Anor v. Henry Wong Jan Fook [1980] 1 LNS 190 FC ***(refd)***
Kian Lup Construction v. Hong Kong Bank Malaysia Bhd [2002] 7 CLJ 32 HC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Lee Kuan Yew v. JB Jayaretnam [1978] 1 LNS 93 HC ***(refd)***
Miles v. Logan [1851] 1 Ky 80 ***(refd)***
RV Flower [1880] 44 JP 377 ***(refd)***
Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Bhd & Anor [1973] 1 LNS 146 HC ***(refd)***
Tay Kheng Hong v. Heap Moh Steamship Co Ltd [1964] 1 LNS 202 HC ***(refd)***
Tun Datuk Patinggi Hj Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 78

Other source(s) referred to:
Keith R Evan, *The Law Of Defamation In Singapore & Malaysia,* 2nd edn, Butterworth, pp 49-54, 84-88
Price & Doudu, *Defamation Law, Procedure & Practice,* 3rd edn, p 208

For the appellant - Malik Imtiaz Sarwar, Renu Zechariah & Cheryl Kwan; M/s Rosley Zechariah
For the respondent - Hisham Fauzi; M/s Hisham Fauzi & Assocs

[Editor's note: Appeal from High Court, Kota Bharu; Suit No: 23NCVC-1-01-2015 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Asmabi Mohamad JCA:

Introduction

[1] This is an appeal arising from the decision of the learned judge of the High Court at Kota Bharu dated 24 January 2016 which dismissed the appellant's claim for defamation with costs of RM10,000.

[2] After having perused the appeal records, the written submissions of the respective parties as well as hearing the oral arguments on the issues raised, we allowed the appeal with costs of RM20,000 herein and below. We also ordered damages in the sum of RM70,000 to the appellant.

[3] Our reasons for doing so now follow.

[4] For ease of reference, the parties will be referred to as they were described in the High Court.

Brief Background Facts

[5] The plaintiff, Abu Hassan bin Hasbullah was at all material times a senior academician/lecturer and political analyst and also the Dean of the Faculty of Creative Technology and Heritage ("FTKW") at the University Malaysia Kelantan ("UMK"). The plaintiff was the superior of the defendant in FTKW.

[6] The defendant, Zukeri bin Ibrahim was at all material times a lecturer on probation in FTKW.

[7] The plaintiff had commenced an action against the defendant for the tort of defamation. The plaintiff claimed that the defendant had authored two offensive emails dated 29 October 2014 and 30 October 2014 respectively ("the impugned emails") (see pp. 841-844, part B of appeal record ("AR")) and caused the same to be published *via* the defendant's UMK email address ie, zukeri@umk.edu.my to various groups of people namely:

(a) All academic staff of FTKW at the email address of academic.ftkw @groups.umk.edu.my;

(b) All administrators of FTKW at email address of admin.ftkw@groups. umk.edu.my; and

(c) The FTKW at email address at ftkw@groups.umk.edu.my.

[8] The plaintiff contended that the words in the impugned emails as underlined, in their natural and ordinary meaning, were defamatory of the plaintiff and in their natural and ordinary meaning meant and were understood to mean as described in para. 9 of the statement of claim (see pp. 36-38 of part A, vol. 1 of AR).

[9] These impugned emails were calculated to disparage the plaintiff and were issued with malicious intent and published and circulated to the above-stated groups.

[10] As a consequence of the publication of these impugned emails which was likely to be circulated and read by the recipients of the above-stated addresses, the plaintiff suffered distress and embarrassment and his personal

reputation and that of his office have been adversely affected and had caused him to be despised and injured and brought into public scandal, odium and contempt.

[11] Between 28 October 2014 to 31 October 2014, the defendant too had sent various text messages from his mobile phone to the plaintiff, *inter alia,* threatening to have the plaintiff sent to jail and falsely accused the plaintiff of cheating on his grading.

[12] The plaintiff had also come to know on 4 November 2014, a group of lecturers and students from his faculty had assembled and signed a memorandum demanding for his removal as the Dean of the FTKW.

[13] Subsequent to the said impugned emails and text messages, there had been a barrage of articles, news, reports, statements posted almost daily since 5 November 2014 on online news portal Suara TV stating that Suara TV had been informed by an individual who is a lecturer in UMK that the plaintiff had committed fraud, that a police report had been lodged against him in Bachok Police Station, Kelantan on 1 November 2014 and yet no steps were taken against the plaintiff.

[14] *Vide* the plaintiff's solicitors letter dated 20 November 2014, the plaintiff demanded the defendant to withdraw and/or retract the two impugned emails, render an apology to the plaintiff as well as to give an undertaking that he would not repeat similar publication of defamatory statements concerning the plaintiff to the public at large. The plaintiff had also demanded that the defendant ceases to cause any further threats and harassments to the plaintiff.

[15] The plaintiff then commenced this suit seeking for, amongst others, injunctive relief, damages for defamation, interest and costs.

[16] In response to the plaintiff's claim, the defendant pleaded the defence of justification. He also claimed that the impugned emails were "fair comments" on matters of "public interest" to UMK, FTKW and all its students. The defendant had also relied on the defence of "qualified privilege" stating that the impugned emails were a proposal to resolve pending problems and to raise matters concerning the administration and management of FTKW. The impugned emails too were to highlight wrongdoings of the plaintiff in FTKW specifically and UMK generally.

[17] The case proceeded by way of a full trial with three witnesses for the plaintiff and four witnesses for the defendant having testified. After perusing the respective submissions filed therein and having heard oral arguments of both parties, the learned judge accepted the defendant's defences and dismissed plaintiff's claim with costs.

[18] Aggrieved by the said decision, the plaintiff then appealed to this court against the whole decision.

The Decision Of The High Court

[19] The findings of the learned judge were as follows:

(a) The issue on plagiarism is successfully justified by the defendant as it was proved that the plaintiff's PhD thesis entitled "Film As A Lens of Cultural Identity: A Critical Analysis on Malaysia Film" was copied exactly from the writing of Viola Shafiq from the book of "*Arab Cinema*".

(b) Although the plaintiff's thesis was not 100% copied, there were certain parts that were copied and the references and/or sources of which were not stated and/or quoted.

(c) The defendant was justified in making the remarks that the plaintiff had created on his own, a university known as "University Manggis", in order to give the impression certain insertions or materials he fabricated and/or cooked up in his thesis were actually sourced from credible and influential academic references.

(d) The defendant was the Accreditation Officer at the Quality Management Centre of UMK and was responsible to review the courses in FTKW to determine whether those courses were in accordance with the requirement set by the Malaysian Accreditation Agency ("MQA").

(e) On the issue of courses offered without approval of MQA, the defendant has successfully raised the defence of fair comments and qualified privilege as the "Laporan Audit Komprehensif FTKW" disclosed that eight programmes offered by the faculty were without MQA's approval. Those programs were offered without qualified lecturers in the specified areas. There were also issues pertaining to inadequacy of lecture halls and clashes with the schedule of classes, which eventually led to the scraping of those courses.

(f) The defendant was also justified in making remarks on other issues such as mismanagement of finance of FTKW and inaccuracy in reporting of meeting outcomes.

(g) The defamatory remarks were true, which were disclosed only upon the investigation conducted by the defendant personally.

(h) The defendant had raised the defence of qualified privilege since those issues involved academic staff and the students of UMK and is part of the job function of the defendant as the Accreditation Officer at the Quality Management Centre of UMK.

(i) The defendant had successfully raised the defence of fair comment and qualified privilege, and the reporting by the defendant was based on true facts and not tainted by bad faith.

Our Decision

The Law

[20] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance.

[21] In the course of that, we had sought guidance from the very often quoted case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 where the Court of Appeal held as follows:

> an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.

[22] Reference is also made to the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 where the Federal Court held that the test of "insufficient judicial appreciation of evidence" adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

[23] In the above case, the Federal Court had also stated, the court hearing the appeal is entitled to reverse the decision of the trial judge after making its own comparisons and criticisms of the witnesses and of its own view of the probabilities of the case. It is also entitled to examine the process of evaluation of the evidence by the trial court and reverse the decision if it is wrong.

[24] At the end of the case, the trial judge has a duty to explain how the said court had come to its findings and/or how it appraised the evidence and issues which will determine the outcome of the case before it. In doing so, the judge need not explain or identify every factor that he had considered. If the learned judge failed to do so, his decision can be set aside (see *English v. Emery Reimbold & Strick Ltd, DJ & C Whithers (Farms) Ltd v. Ambic Equipment Ltd, Verrechia (trading as Freightmaster Commercials) v. Commissioner of Police Metropolis* [2002] EWCA Civ 605, [2002] 3 All ER 385).

[25] The appellate court must be slow to interfere with the findings made by the trial court unless if it can be shown there was no judicial appreciation of the evidence adduced before it (see *Hamit Matusin & Ors v. Penguasa Tanah dan Survei & Anor And Another Appeal* [2006] 2 CLJ 251; *Tay Kheng Hong v. Heap Moh Steamship Co Ltd* [1964] 1 LNS 202; [1964] MLJ 87).

The Appeal Before Us

[26] We have fine-tooth combed the grounds of judgment ("GoJ") and found the following.

[27] The plaintiff's case against the defendant was premised on the tort of defamation. The plaintiff had pleaded that the defendant had caused to be published the impugned emails as in appendix 1 and appendix 2 attached to the plaintiff's statement of claim ("SOC") made on 29 October 2014 and 30 October 2014 respectively. In appendix 1, there were 150 plus eight defamatory statements having been made (see pp. 82 to 100 of vol. 1 of AR). Whilst in appendix 2, another 155 plus eight defamatory statements were made (see pp. 101 to 124 of vol. 1 of AR).

[28] According to the plaintiff, the words underlined in the impugned emails, in their natural and ordinary meaning meant and were understood to mean the meanings as described by the plaintiff in para. 9 of his SOC (see pp. 61 to 62 of vol. 1 AR). These words according to the plaintiff, were calculated to disparage the plaintiff and were issued with malice intent and published and circulated.

[29] Despite the magnitude of the complaints made against the defendant as evidenced in the impugned emails, the learned judge had reduced the complaints to only two issues, the non-existence of "University Manggis" which was quoted in the plaintiff's thesis and the unaccredited programmes offered by UMK. The rest of the complaints had been disregarded.

[30] The learned judge had also made a finding that there was plagiarism in the plaintiff's thesis despite the fact that the impugned emails made no reference to the complaint of plagiarism. The learned judge had even proceeded to make a finding that the defendant could rely on the defence of justification and qualified privilege when the complaints of the plaintiff in the impugned emails did not touch the topic of plagiarism.

[31] At para. 20 of the GoJ, the learned judge stated as follows:

> Mahkamah bersetuju dengan hujahan pihak Defendan bahawa **segala tulisan di dalam email beliau adalah benar dan bukannya fitnah berdasarkan penyiasatan beliau** ke atas apa yang dialami oleh pensyarah-pensyarah dan pelajar Universiti Malaysia Kelantan dan pembelaan oleh Defendan adalah pembelaan justifikasi. Selanjutnya, Mahkamah juga bersetuju dengan hujahan Defendan bahawa keterangan Defendan bahawa tulisan email itu telah dibuat berdasarkan dan merangkuni ulasan saksama mengenai Plaintiff sebagai Dekan yang mewakili Fakulti Teknologi Kreatif dan Warisan (FTKW) di Universiti Malaya Kelantan, pendidik, Ahli Majlis Professor Negara dan penganalisis politik yang terkenal. Plaintif sepatutnya sebagai seorang dekan, ahli akademik

ataupun pensyarah kanan dan penganalisis politik yang terkenal harus mengetahui bahawa segala tindakannya diperhati oleh masyarakat awam. (emphasis added)

[32] As can be seen from the above-quoted para. 20 of the GoJ the learned judge made a finding that the words as underlined in the impugned emails were true. However, at paras. 14, 15 and 16 of the GoJ, the learned judge focused on the issue of plagiarism, at para. 17, on the issue surrounding the plaintiff's reference to materials from a non-existent university known as University Manggis in his thesis and at para. 18 on the non-accredited courses. There was no mention of the rest of the over 200 defamatory statements as underlined in the impugned emails.

[33] We were of the view that in arriving at his determination, the learned judge did not address the facts in totality and/or make a finding if those underlined words were defamatory of the plaintiff based on the plaintiff's pleaded case and the evidence of the witnesses before him.

[34] Upon our perusal of the records of appeal, we found that the learned judge did not apply settled principles of law and did not address the three stages that must be satisfied before resolving whether there is defamation and whether the defences apply.

[35] Despite there is a plethora of cases to guide the learned judge on how to resolve the issues before His Lordship when faced with cases of this nature, the learned judge went on a frolic of his own and took a very simplistic approach to resolve the issues before him.

[36] In a defamation case, the learned judge has a duty to rule on the three essential ingredients of the tort of defamation before he proceeds to decide on the defences pleaded by the defendant in his defence. Firstly, the learned judge ought to determine if the impugned emails were capable of bearing the defamatory meaning as ascribed in para. 9 of the SOC. Secondly, the learned judge ought to examine if the impugned emails referred to the plaintiff. Lastly, the learned judge ought to have resolved if the impugned emails were published to a third person.

(see *Ayob Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321) *Abdul Rahman Talib v. Seenivasagam & Anor* [1964] 1 LNS 2; [1965] 1 MLJ 142; *Kian Lup Construction v. Hong Kong Bank Malaysia Bhd* [2002] 7 CLJ 32; *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 1 LNS 146; [1973] 2 MLJ 56; *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1995] 1 LNS 304; [1996] 1 MLJ 393; *Irene Fernandez v. Utusan Melayu (M) Sdn Bhd & Anor* [2008] 2 CLJ 814).

[37] We could not detect anywhere in the GoJ this task was undertaken by the learned judge in the case before His Lordship, especially with respect to whether the words as underlined in the impugned emails were capable of

bearing the defamatory meaning as ascribed in para. 9 of the SOC and whether there was publication. Despite a sum of 158 and 163 defamatory statements respectively having been made in the impugned emails, the learned judge had not made any ruling on these statements. The learned judge was selective and had ruled only on the three issues as highlighted above, one of which was not even the subject matter of the plaintiff's complaint in the SOC.

[38] We also observed the learned judge did not address the third ingredient of the tort of defamation, the publication of the impugned emails to a third party as required of him in resolving cases premised on the tort of defamation.

[39] We are of the view that in a case of this nature, the learned judge ought to have evaluated the evidence before His Lordship and make a finding on each and every ingredient of the tort of defamation before going to the defences. Our view is supported by the case of *Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461 which states as follows:

> In my judgment, the test which is to be applied lies in the question: do the words published in their natural meaning impute to the Plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites affirmative response, then the words complained of are defamatory.

[40] At para. 25 under "Isu: adakah sama ada pernyataan tersebut telah disiarkan kepada pihak ketiga" the learned judge stated as follows:

> [25] Mahkamah mendapati adalah jelas daripada keterangan yang dikemukakan elemen yang pernyataan-pernyataan berkenaan telah dihantar dan disiarkan kepada pihak ketiga adalah tidak dipertikaikan oleh kedua-dua pihak. Di dalam kes ini, pernyataan-pernyataan melalui email tersebut telah dihantar kepada pihak ketiga yang lain sepertimana diplidkan di dalam pernyataan tuntutan Plaintiff. *Sama seperti isu kedua, perkara ini juga tidak diperhalusi dan dibincangkan secara terperinci di dalam penghakiman ini memandangkan elemen pertama telah gagal dibuktikan oleh pihak Plaintiff.* (emphasis added)

[41] From the above paragraph, it would appear that the learned judge was not satisfied that the plaintiff had proven the first ingredient of the tort of defamation. However, upon perusal of the GoJ, we found that the learned judge proceeded to make a ruling that the defendant had successfully raised the defences of justification, qualified privilege and fair comment. If the learned judge was of the opinion the first element of the tort of defamation had not been proven, the learned judge ought to have dismissed the plaintiff's case as the plaintiff had failed to prove his case on the balance of probabilities and ought not to have made a finding that the defendant had successfully raised the defences as pleaded in his defence. The learned judge seemed to be confused on the manner the case before him ought to be resolved. Further,

how could the learned judge say "Sama seperti isu kedua, perkara ini juga tidak diperhalusi dan dibincangkan secara terperinci di dalam penghakiman ini memandangkan elemen pertama telah gagal dibuktikan oleh pihak plaintif." when the learned judge did not decide if the 158 and 163 underlined words respectively in the impugned emails, with the exception of the two we mentioned above, were defamatory of the plaintiff and were calculated to expose the plaintiff to hatred, ridicule or contempt in the minds of reasonable man or whether these words tend to lower the plaintiff in the estimation of right thinking members of society generally.

[42] The learned judge erred in deciding in the manner he did, as the plaintiff need not prove that the defamatory words were false in order to prove his case as the law presumes that the defamatory words were false (see *Miles v. Logan* [1851] 1 Ky 80 (Civ); *Abdul Rahman Talib v. Seenivasagam & Anor (supra)*).

[43] The plaintiff only needs to prove the publication of the impugned emails. "It is not part of the plaintiff's case in an action of defamation to prove that the defamatory words are false for the law presumes this in his favour." (*Abdul Rahman Talib v. Seenivasagam & Anor (supra)*).

[44] In *Irene Fernandez v. Utusan Melayu (M) Sdn Bhd & Anor* [2008] 2 CLJ 814 the court provided the guidelines on how a defamation case ought to be resolved:

(a) The seriousness of the allegation made against the plaintiff;

(b) The nature of the information;

(c) The source of the information, eg, some information have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories;

(d) The steps taken by the respondent to verify the information;

(e) The status of the information;

(f) The urgency of the matter;

(g) Whether comment was sought from the plaintiff;

(h) Whether the article contained the gist of the plaintiff's side of the story;

(i) The tone and theme of the offending words; and

(j) The circumstances of the publication including the timing.

[45] On our perusal of the GoJ, we observed that the learned judge failed to follow the settled principles of law and had not made any findings on the matters as discussed above. We were of the view, the learned judge erred in not applying the principles set out by the law in resolving the issues before him.

[46] Only upon having been satisfied that all the three ingredients of the tort of defamation having been established by the plaintiff, then the next step is for the learned judge to examine if the defendant could rely on the defences pleaded in the defence.

[47] The defendant pleaded that the words underlined in the impugned emails were true and relied on the defence of justification.

[48] At paras. 42-44 of his defence, the defendant pleaded that the impugned emails were "fair comments" on matters of "public interest" communicated to members of UMK, FTKW as well as UMK's students.

[49] The defendant also relied on the defence of qualified privilege and alleged that the impugned emails were a proposal to resolve pending problems concerning the administration and management of FTKW and the alleged wrongdoings of the plaintiff in the said management.

Defence Of Justification

[50] We will now examine if the defence of justification is available to the defendant. In *Irene Fernandez v. Utusan Melayu (M) Sdn Bhd & Anor (supra)* the court held as follows:

> In a defamation action, the defence of justification is complete defense if it succeeds. And the question of malice or bad faith does not arise. *But, in order to succeed in the defence of justification a Defendant must establish the truth of all the material statements in the words complained of which may include defamatory comments made therein.* And in order to justify such comment, it is necessary to show that the comments are correct imputations or conclusions to be drawn from the proved facts. However, the plea of justification does not fail by reason only that the truth of every charge is not provided if the words proved to be true do not materially injure the Plaintiff's reputation having regard to the truth of the remaining charges (see s. 8 of the Defamation Act 1957 and *Abdul Rahman Talib v. Seenivasagam & Anor* [1966] 2 MLJ 66). It is also to be noted the partial justification may be useful in the mitigation of damages. (emphasis added)

[51] In *Datuk Seri Anwar Ibrahim v. Utusan Melayu (M) Bhd & Anor* [2013] 3 MLJ 534, the court held:

> For the defence of justification, the Defendants failed to provide that the articles published were true in substance and effect. In other words, **the defence of justification requires the Defendants to prove the same to be true in substance or materially different from truth.** (emphasis added)

[52] The defendant argued that the impugned emails were true in fact and substance and the same were sent to persons who had the essential interest in receiving the same and that he has the right to send the same. We agree with the plaintiff that the defence of justification and qualified privilege was wrongly accepted by the learned judge due to the following reasons as highlighted by the plaintiff:

(a) The impugned emails were addressed to third parties who did not have an interest or duty to receive the same. A

(b) The impugned emails were not true nor proven to be true.

(c) When the defendant wrote the two impugned emails, he was a probationary lecturer and there was a clear avenue and/or procedure for complaints to be addressed on matters concerning FTKW. In fact, the defendant as well as his witnesses had confirmed under oath this fact. In view of the aforesaid, the defendant did not have the duty to send the impugned emails in the way he did. B

(d) The impugned emails were written from the defendant's official UMK email address which has its own guidelines on the dos and the don'ts to its users on the use of that media. It was disclosed during trial by the defendant and his witnesses that the defendant did not adhere to UMK's own guidelines in sending the said impugned emails to the recipients of the three mentioned email addresses. C D

(e) The words underlined in the impugned emails were statement of facts that were not true and not verified to be true prior to the defendant having published the same.

(f) The defendant raised issues of *inter alia*, racism, corruption, committing illegal acts, ill-treating staffs, etc. E

[53] As shown above, other than the two mentioned issues herein, the learned judge did not address the rest of the complaints in the impugned emails in his GoJ which form the bulk of the complaints. There was a sum of 155 plus eight and 163 allegedly defamatory statements respectively having been identified in appendix 1 and appendix 2 which the learned judge had totally disregarded. Despite the magnitude of the complaints having been pleaded in the SOC, the learned judge chose to ignore these and proceeded to rule only on two statements and another complaint which was not pleaded. Further, there was no analysis of the evidence adduced before the learned judge with respect to the bulk of the complaints. If these complaints were true or otherwise it could not be ascertained as the learned judge had ignored these complaints completely. The learned judge erred in doing so as we have mentioned earlier, the learned judge did not make a finding if the bulk, the complaints in the impugned emails were defamatory of the plaintiff. F G H

[54] How could the learned judge make a finding that the impugned emails were true when he had only considered two of the 155 plus eight and 163 complaints as underlined in appendix 1 and appendix 2 of the SOC and left out the bulk of the complaints as shown above. The learned judge fell into an error when he resolved that the defendant had successfully raised the defence of justification when there was no explanation afforded with regards to the bulk of the complaints. I

[55] The defendant did not prove justification or the words as underlined in the impugned email were true. A defendant who relied on the defence of justification must substantially justify the statements by proving their precise truth and every defamatory fact as alleged. The defendant cannot rely on his honest belief that the statements were true.

[56] On the point of pleading, the plea of justification must be specific as to which parts of the statements were said to be the truth. We observed that from the point of pleadings right to actual proof, the learned judge erred in law and fact by failing to hold that the defendant's defence was defective as the defendant had not identified and/or particularised which part of the impugned emails enjoyed protection of justification.

(see *Abdul Rahman Talib v. Seenivasagam & Anor (supra)*; "*The law of Defamation in Singapore & Malaysia*" by Keith R. Evan 2nd edn, Butterworth at pp. 49-54)

Fair Comments

[57] We move on to the defendant's defence of fair comments. At para. 20 of the GoJ, (see para. 33 above) the learned judge stated that the defendant could rely on the defence of fair comment as all the complaints in the impugned emails were true and not defamatory based on the defendant's investigation and from the experience of the lecturers and students of UMK. The learned judge agreed that the defendant has successfully raised this defence as these were fair comments concerning the plaintiff who is the Dean of FTKW in UMK, an educationist, a member of Majlis Professor Negara, an academia, a senior lecturer and a well-known political analyst who ought to know that all his acts would be under the close scrutiny of the public at large.

[58] Based on the same argument as stated under the defence of justification, we found that as there was no finding of facts made with respect to other complaints in the impugned emails which contained about 150 plus eight in appendix 1 and 163 in appendix 2, except for the two complaints discussed herein. Hence, the learned judge's finding that the complaints of the plaintiff were true in substance could not be correct. The learned judge ought to have considered if the defence of fair comment could be relied by the defendant and only after having found that the 150 plus eight and 163 complaints were true in substance, then and only then the learned judge could decide if the defence of justification is available to the defendant. As the learned judge had failed to undertake this task, the rests of the complaints were not proved as true.

[59] Even for the two complaints with respect to reference to a non-existent university as in University Manggis and the unaccredited courses, which the learned judge found to have been proved, there was no evidence before the learned judge that these complaints were, in fact, true so as to afford the protection of the defence of justification to the defendant. With respect to University Manggis, the evidence showed that the reference was not to University Manggis but a blog site known as "Universiti.Manggis". Whilst the matters concerning the unaccredited courses, the defendant was not the person responsible as the approvals of programmes and the decisions were made by the Chancellor, the Senate of UMK and the Ministry of Education.

[60] We were guided by the case of *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd (supra)* which held as follows:

> For the defence of fair comment, in order to succeed the following basic elements must be established by the Defendant, namely:
>
> 1. That the words complained of are comments, though they may consist of or include inference of fact;
> 2. That the comments are on a matter of public interest; and
> 3. That the comments are based on facts, truly stated. They must also be fair and which a fair-minded person can honestly make on the facts proved.

[61] *Gatley on Libel and Slander*, 9th edn, states as follows:

> To succeed in a defence of fair comment **the Defendant must show that the words are comment, and not a statement of fact.** He must also show that there is a basis of fact for the comment, contained or referred to in the matter complained of. (emphasis added)

[62] What is fair comment had been defined by *Gatley on Libel and Slander*, 9th edn as follows:

> More accurately it has been said that the sense of comment is "something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc." Per Cussen J in *Clark v. Norton* [1910] VLR at 499.

[63] As the learned judge did not make a finding if the 150 plus eight and 163 complaints in appendix 1 and appendix 2 were defamatory of the plaintiff, how could the learned judge go on to say that the complaints were fair comment. Our scrutiny of the complaints stated in the impugned emails, showed that these were not comments as defined in the *Gatley* but statement of fact which could not be termed as comment for the purpose of the defence of fair comment. In *Lee Kuan Yew v. JB Jayaretnam* [1978] 1 LNS 93; [1979] 1 MLJ 281 the court held that "a libelous statement of fact is not a comment

A or criticism of anything". Therefore, based on the defendant's pleadings, it is not open to the defendant to raise defence of fair comment concerning the public at large (see *RV Flower* [1880] 44 JP 377).

[64] On the point of pleading, we observed that the defendant had not complied with the provision of O. 78 of the Rules of Court 2012. The B defendant had failed to give particulars stating which of the words complained of, that he alleged were statement of facts and matters he relied on in support of the allegation that the words were true.

[65] Based on the foregoing, it is our humble view, the learned judge erred in law and in fact in his finding that the defence of fair comment was C available to the defendant.

Qualified Privilege

[66] The defendant had also relied on the defence of qualified privilege. In *Adam v. Ward* [1917] AC 309 at p. 334, Lord Atkinson stated as follows:

D

> A privilege occasion … is an occasion where the person who makes a communication has an interest or a duty, legal or social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential.

E

[67] In *John Lee & Anor v. Henry Wong Jan Fook* [1980] 1 LNS 190; [1981] 1 MLJ 108 it was held:

> Where a statement made by a person having legal duty to make it and the recipient has a corresponding interest or duty to receive it, such communication is privileged.

F

[68] Turning now to the case at hand, where the defendant pleaded that the impugned emails were sent to the persons who had an essential interest in receiving the same and that he had the right to send these impugned emails. We observed that the impugned emails were sent by a person who did not have the legal duty and interest or a duty, legal or social or moral, to make G it and the recipient of the impugned emails did not have a corresponding interest or duty to receive it.

[69] At the time the impugned emails were sent, the defendant was only a probationary lecturer. At the material time, there is already in place a H mechanism in UMK for matters such as this to be referred to. The defendant and his witnesses had confirmed this in their testimony in court. Therefore, the defendant did not have the legal duty and interest or a duty, legal or social or moral to send the impugned emails to the three email addresses stated herein. Further, it was shown *via* evidence there was a set of procedure for sending emails on the UMK email address but this was not followed by the I

defendant. In fact, the defendant had breached the guidelines issued by UMK on the use of the email address. The defendant and his witnesses admitted that what the defendant did was not in accordance with the guidelines issued by UMK.

[70] The impugned emails were statement of facts that were not true. The defendant pleaded that it was based on his personal investigation. Other than what was pleaded, nothing more was shown and/or proved. Issues such as racism, corruption, committing illegal acts and ill-treating staff were raised by the defendant against the plaintiff, however, no findings had been made by the learned judge with respect to the truth of the matter.

[71] In view of the foregoing, the learned judge erred:

(a) In holding that, the defendant who was a lecturer on probation attached to FTKW, could rely on the defence of qualified privilege and caused the impugned emails to be sent and/or circulated to various third parties containing the defamatory statements concerning his superior who was the Dean of FTKW without having to resort to the legal mechanism provided by UMK, which the defendant and his witnesses confirmed existed.

(b) Despite the magnitude of the complaints and the defective pleadings, due to lack of particulars with regards to the relevant part of the words as underlined in the impugned emails that were protected by the defences raised by the defendant as discussed above, the learned judge proceeded to rule that the defendant could rely on the defences as pleaded in his defence.

(c) With respect to reciprocity of the defendant to send and the recipient to receive the same, the learned judge failed to hold that the defendant did not have the legal duty and interest or a duty, legal or social or moral, to make it and the recipient of the impugned emails did not have a corresponding interest or duty to receive as there was already a mechanism for making complaints about the plaintiff which was not followed by the defendant.

Malice

[72] Malice is an essential element in an action premised on the tort of defamation. Malice in gist means making use of the occasion for improper purpose (see pp. 84-88 of *"The Law of Defamation in Singapore & Malaysia" (supra)*). Malice if established would defeat the defence of fair comment and qualified privilege. The learned judge had failed to address this issue. In this case, the plaintiff contended that there were eight instances of malice (elaborated in the plaintiff's written submission) which were not addressed by the learned judge as follows:

A (a) The defendant had sent malicious and offensive text messages to the plaintiff. This was admitted by the defendant.

(b) The defendant had liaised with and forwarded the impugned emails to an online news blog known as Suara TV.

B (c) The defendant had liaised and forwarded the impugned emails to a student blog post known as "Pemudatekat.blogspot".

(d) The defendant had made a complaint to the University of Vienna, the university the plaintiff pursued his doctorate.

C (e) The defendant had posted numerous postings on Facebook and published the impugned emails.

(f) The defendant had lodged a police report against the plaintiff.

(g) The defendant continued to defame the plaintiff even after the legal notice was issued.

D (h) The defendant sent a letter to Duli Yang Maha Mulia Sultan of Kelantan without the approval of UMK and using UMK's letterhead without the approval and the authority of UMK.

[73] We have perused the plaintiff's written submission under heading "3rd E Stage: DEFENCES DEFEATED BY MALICE" at pp. 18 to 26 and fully agree that the learned judge failed to address this issue of malice and whether malice if proved, would defeat the defence of fair comment and qualified privilege. Clearly, the learned judge erred in not addressing this essential element of the tort of defamation, in that, whether the defences put forth by F the defendant was defeated by malice.

Liability

[74] Having perused the appeal records and heard the respective submissions, we hold and conclude, on the balance of probabilities the defendant in this action is liable to the plaintiff. We are satisfied that on the G balance of probabilities, the words as underlined in the impugned emails are capable of and are defamatory of the plaintiff. These words in their natural and ordinary meaning, meant or were understood to bear the meaning as ascribed by the plaintiff in para. 9 of the SOC. We are satisfied, the words as underlined in the impugned emails which referred to the plaintiff were H published to third parties. Further, we are not satisfied the defendant has established on the balance of probabilities any of the defences pleaded in his defence.

Damages

I **[75]** In awarding damages for a claim founded on defamation, we were guided by the established authorities enunciated by the Higher Courts. One of such cases which had been often-quoted by the courts across the country is the case of *Chin Choon v. Chua Jui Meng* [2005] 2 CLJ 569 where His

Lordship Justice Sri Ram JCA had made reference to the book entitled "*Defamation Law, Procedure & Practice*" by Price & Doudu 3rd edn" at p. 208 which had laid down the principles to guide the court in assessing compensatory damages for defamation cases as follows:

(a) The gravity of the allegation;

(b) The size and influence of circulation;

(c) The effect of publication;

(d) The extent and nature of claimant's reputation;

(e) The behaviour of the defendant; and

(f) The behaviour of the claimant.

[76] The allegations against the plaintiff were very serious imputing to him, *inter alia*, criminal act, dishonesty, lack of credibility, greed and cheating. These allegations were highly libellous to the plaintiff. Any award to be awarded must be sufficient to vindicate the gravity of the allegations against the plaintiff.

[77] The plaintiff is a senior lecturer, an educationist, a member of Majlis Professor Negara, political analyst and the Dean of FTKW of UMK. Hence the plaintiff deserved an appropriate vindication and ought to be adequately compensated.

[78] The defendant had never expressed any regret and or remorse on the alleged defamatory statements which had been published. Neither had the defendant apologised for the said publication.

[79] Perhaps it would be appropriate at this juncture for us to examine the pattern and or trend of damages awarded by the court in order to ascertain what would be a fair and suitable damages to be awarded to the plaintiff. In *Chin Choon v. Chua Jui Meng* [2005] 2 CLJ 569 for instance, where the defamation case involved a Cabinet Minister, the Court of Appeal saw it fit to reduce the award of damages of RM1.5 million to only RM200,000. The court ruled that the award of RM1.5 million awarded by the High Court was excessive. In *AJA Peter v. OG Nio & Ors* [1979] 1 LNS 1; [1980] 1 MLJ 226 which case concerned a claim by an insurance supervisor of an insurance company against another agency supervisor, the award of damages of RM15,000 was reduced to RM9,000.

[80] The amount of damages to be awarded by the court in each case depends on the facts and the circumstances of the case. Looking at the facts of this case, the position of the plaintiff, the behaviour of the defendant, we awarded compensatory, aggravated and exemplary damages of RM70,000 to the plaintiff. We are of the view that the damages awarded by the court is adequate to vindicate the plaintiff to the public and console him for the wrong done to him by the defendant.

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Conclusion

[81] Having examined the pleadings, the notes of proceedings, and having heard the respective learned counsel, we found that the learned judge had not given sufficient judicial appreciation of the evidence both testimonial and documentaries as well as the established principles of law concerning the tort of defamation. We were constrained to hold that the learned judge failed to judicially appreciate the evidence and/or the law presented before him so as to render his decision plainly wrong and upon curial scrutiny, it merits our appellate intervention. Hence, we unanimously allowed this appeal and set aside the order of the learned judge dated 24 January 2016 with cost of RM20,000 subject to payment of allocator fees. The deposit is refunded to the plaintiff.

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[82] We, therefore, ordered accordingly.

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